No. 16236

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WASHIB ULLAH,

Appellant,

vs.

RICHARD C. HOY, Acting District Director, Immigration and Naturalization Service, Los Angeles, California,

Appellee.

BRIEF FOR APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

JAMES R. DOOLEY,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Rules

Statutes

Textbooks

No. 16236

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WASHIB ULLAH,

Appellant,

vs.

RICHARD C. HOY, Acting District Director, Immigration and Naturalization Service, Los Angeles, California,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

Appellant instituted an action in the court below seeking review of an order of deportation outstanding against him [Tr. 2-4].[1] The District Court had jurisdiction of appellant's action under the provisions of Section 10 of the Act of June 11, 1946 (Administrative Proc. Act), 60 Stat. 243, 5 U. S. C. A. Section 1009 [*Shaughnessy v. Pedreiro,* 349 U. S. 48 (1955)], and since its judgment [Tr. 23] was a final decision, jurisdiction is conferred upon this Court by 28 U. S. Code, Section 1291.

---

[1]"Tr." indicates references to the Clerk's Transcript of Record, which apparently is being considered in its original form. "R." indicates references to the Reporter's Transcript of Proceedings. References to appellant's Opening Brief will be indicated by "Br." Defendant's (appellee's) Exhibit A will sometimes be abbreviated "Ex. A."

Statement of the Case.

Appellant is an alien, a native of Pakistan, formerly British East India. He last entered the United States at New York, New York, on June 9, 1944 [Ex. A; Tr. 20].

On February 13, 1946 a warrant of arrest was issued by the District Director, Immigation and Naturalization Service, San Francisco, California, charging that appellant was subject to deportation on the following grounds [Ex. A; Tr. 20]:

(1) The Immigration Act of May 26, 1924, in that at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder;

(2) The Immigration Act of May 26, 1924, as amended, in that, he is an alien ineligible to citizenship and was not entitled to enter the United States under any exceptions of paragraph (c) Section 13 thereof;

(3) The Act of February 5, 1917, in that at the time of entry, he was unable to read the English language, or some other language or dialect, including Hebrew or Yiddish, although at that time over 16 years of age and physically capable of reading and was not exempt from the literacy test by any of the provisions of Section 3 of said Act.

Pursuant to the aforementioned warrant of arrest a deportation hearing was held at San Francisco, California, on February 19, 1946 and March 4, 1946. On March 12, 1946 the Presiding Inspector rendered his opinion, including proposed findings of fact, proposed conclusions of law, and proposed order, recommending that appellant be deported to India on the charges stated in the warrant of arrest. On March 28, 1948, the Acting Com-

missioner of Immigration adopted the findings of fact and conclusions of law proposed by the Presiding Inspector and ordered that appellant be deported to India on the charges contained in the warrant of arrest. This order was affirmed by the Board of Immigration Appeals, Department of Justice, on April 1, 1946 [Ex. A; Tr. 20-21].

Under date of March 27, 1947 appellant was informed by registered letter return receipt requested that authority had been granted to stay deportation until July 1, 1947, on condition that he depart from the United States voluntarily or reship foreign one way. He was further informed that failure to depart by July 1, 1947 would result in deportation in accordance with the provisions of the outstanding warrant of deportation [Ex. A; Tr. 21].

On April 1, 1949 the Assistant Commissioner of Immigration moved the Board of Immigration Appeals, Department of Justice, to enter an order amending the outstanding order and warrant of deportation to provide for deportation to Pakistan, because of the separation of the Dominions of India and Pakistan, and deleting therefrom the ground of deportability based upon the alien's ineligiblity to citizenship. On May 6, 1949 the Board of Immigration Appeals granted this motion [Ex. A; Tr. 21].

On September 7, 1951 appellant moved that the hearing be reopened to permit him to apply for suspension of deportation. On October 11, 1951 the Assistant Commissioner of Immigration denied appellant's motion; and on December 6, 1951 appellant's appeal from the order of denial was dismissed by the Board of Immigration Appeals [Ex. A; Tr. 21].

On January 22, 1958 appellant filed a complaint [Tr. 2-4] in the court below seeking review of his deportation

proceedings [Tr. 4]. After answer [Tr. 8-11], the District Court by letter dated April 7, 1958 addressed to counsel for the parties, gave notice that the action had been calendared for May 5, 1958 for pre-trial conference and setting [Tr. 7]. This pre-trial conference and setting was thereafter continued to May 12, 1958 by stipulation of the parties and order of court [Tr. 14-15].

The District Court had received the record of appellant's deportation proceedings on Friday, May 9, 1958 and had reviewed it [R. 6].[2] When the pre-trial conference convened on May 12, 1958, the Court asked counsel whether there was "anything more to do in this case than to submit it on the transcript" [R. 2]. After a colloquy between the court and counsel representing appellant at the hearing, the latter stated:

> "Mr. Sturr: Very well, your Honor. All I can do is submit it." [R. 7].

Thereafter the record of appellant's deportation proceedings was received in evidence [Ex. A] and the District Court ordered appellant's complaint dismissed [R. 7]. Findings of Fact, Conclusions of Law, and Judgment were thereafter entered [Tr. 19-23].

Issues Presented.

1. Was the District Court authorized to render a final decision at the pre-trial conference?

2. Did the action of the District Court in rendering a final decision at the pre-trial conference deprive appellant of procedural due process of law in violation of the Fifth Amendment?

---

[2]While not shown in the record, counsel for appellee delivered Exhibit A to the Court at the latter's request.

Statutes and Rules Involved.

Section 10 of the Act of June 11, 1946 [Administrative Proc. Act], 60 Stat. 243, 5 U. S. C., Section 1009 provides in part:

> "Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

Rule 1, Federal Rules of Civil Procedure, 28 U. S. C. A., provides:

> "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 16, Federal Rules of Civil Procedure, 28 U. S. C. A., provides:

"In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."

Rule 57, Federal Rules of Civil Procedure, 28 U. S. C. A. provides:

> "The procedure for obtaining a declaratory judgment pursuant to Title 28 U. S. C., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

ARGUMENT.

I.

The District Court Was Authorized to Render a Final Decision at the Pre-Trial Conference, Since There Were No Issues of Fact to Be Tried.

The Federal Rules of Civil Procedure were designed to effect the "just, speedy, and inexpensive determination of every action" [Rule 1, Fed. Rules of Civ. Proc.; 3 Moore's Fed. Practice, Sec. 16.02]. Consonant with this purpose Rule 16 confers broad discretion upon the District Court as to what matters should be determined at a pre-trial conference. As the author in 6 Cyclopedia of Federal Procedure, Section 19.11, states (p. 284):

> "In its text, Rule 16 lists five specific elements which the court may order to be taken up in pre-trial conference. These are clearly not all-inclusive, because after naming them the Rule suggests as appropriate for consideration at a pre-trial conference 'such other matters as may aid in the disposition of the action.' This, 'an omnium gatherum clause of the very broadest generality,' *is virtually as broad an in-*

> *vitation to the employment of judicial discretion in pre-trial practice as could be phrased,* as it makes 'aid in the disposition of the action' the only test of appropriate subject matter of a pre-trial conference. * * *" [Emphasis added.]

Whereat pre-trial, admissions and pleadings show that no issue of fact remains to be determined, the Court has power to decide the issues of law and enter judgment thereon.

> *Holcomb v. Aetna Life Insurance Co.,* 255 F. 2d 577 (10th Cir. 1958), cert. den. 350 U. S. 986 and 358 U. S. 879.
>
> *Biaggi v. Giant Food Shopping Center,* 244 F. 2d 786 (Dist. Col. Cir. 1957);
>
> *MacMaugh v. Baldwin,* 239 F. 2d 67 (Dist. Col. Cir. 1956);
>
> *Newman v. Granger,* 141 Fed. Supp. 37 (W. D. Pa. 1956), aff'd 239 F. 2d 384 (3d Cir. 1957);
>
> *Lane v. Brown,* 63 Fed. Supp. 685 (D. C. Mich. 1945);
>
> *McComb v. Trimmer,* 85 Fed. Supp. 565 (D. C. N. J., 1949);
>
> *Silvera v. Broadway Department Store,* 35 Fed. Supp. 625 (S. D. Calif. 1940).

And a court at the pre-trial conference has power to compel the parties to agree to all facts concerning which there can be no real dispute [*Holcomb v. Aetna Life Insurance Co., supra; Berger v. Branner,* 172 F. 2d 241 (10th Cir. 1949), cert. den. 337 U. S. 941; *McDonald v. Bowles,* 152 F. 2d 741 (9th Cir. 1945); *Package Machinery Co. v. Hayssen Manufacturing Co.,* 164 Fed. Supp. 904 (E. D. Wisc. 1958), aff'd 266 F. 2d 56 (7th Cir. 1959)].

There were no issues of fact to be tried in the District Court. During the pre-trial conference hearing, counsel then representing appellant failed to present any genuine issues of fact to be tried,[3] and eventually submitted the cause for decision [R. 7]. This is not surprising in view of the fact that appellant merely sought judicial review of an order of deportation outstanding against him. Deportation orders, not generally raising any issues of fact for trial *de novo* in the District Court, are frequently determined on motions for summary judgment [*Miyaki v. Robinson,* 257 F. 2d 806 (7th Cir. 1958), cert. den. 358 U. S. 894; *Alexiou v. Rogers,* 254 F. 2d 782 (Dist. Col. Cir. 1958); *Nani v. Brownell,* 247 F. 2d 103 (Dist. Col. Cir. 1957), cert. den. 355 U. S. 870; *Vichos v. Brownell,* 230 F. 2d 45 (Dist. Col. Cir. 1958); *Melachrinos v. Brownell,* 230 F. 2d 42 (Dist. Col. Cir. 1956); *Asikese v. Brownell,* 230 F. 2d 34 (Dist. Col. Cir. 1956)]. Similarly, where at pre-trial, no issue of fact remains to be determined, judgment may be summarily entered [*Holcomb v. Aetna Life Insurance Co., supra; Biaggi v. Giant Food Shopping Center, supra; MacMaugh v. Baldwin, supra; Newman v. Granger, supra; Lane v. Brown, supra; McComb v. Trimmer, supra; Silvera v. Broadway Department Store, supra*].

Appellant contends that there existed an issue as to voluntary departure (Br. 8-9), which "should have been determined in a proper trial" (Br. 9). The record discloses that after appellant had been granted voluntary departure and he failed to depart by the date specified; he moved that the hearing be reopened to permit him to ap-

---

[3]Counsel representing appellant at the pre-trial hearing must be presumed to have been familiar with the issues of the case; since one of the express purposes of Rule 16 is "simplification of the issues."

ply for suspension of deportation which motion was denied [Ex. A; Tr. 21] and in his complaint appellant prays, *inter alia,* "that the United States Immigration and Naturalization Service be directed to reopen the deportation hearing to permit filing of another application for voluntary departure, on the ground, among other things, that plaintiff is not statutorily ineligible for voluntary departure" [Tr. 4].

Whether a deportable alien is to be permitted voluntarily to depart the United States or whether deportation is to be suspended is a matter within the discretion of the Attorney General [*Hintopoulous v. Shaughnessy,* 353 U. S. 72, 77 (1957); *Jay v. Boyd,* 351 U. S. 345, 354 (1956); *Gugiani v. Barber,* 261 F. 2d 709 (9th Cir. 1958), dismissed pursuant to stipulation, 358 U. S. 924]. Similarly, rehearings in administrative proceedings are not a matter of right, but lie within the discretion of the agency making the order [*United States v. Pierce Auto Lines,* 327 U. S. 515, 535 (1946); *I. C. C. v. Jersey City,* 322 U. S. 503, 514-519 (1944)]; and this rule is applicable to motions to reopen or to reconsider made in deportation proceedings [*Wolf v. Boyd,* 238 F. 2d 249, 253 (9th Cir. 1957), cert. den. 353 U. S. 936; *Arakas v. Zimmerman,* 200 F. 2d 322, 323-325 (3d Cir. 1952)].

Conceding that the courts may review the exercise of discretion by the Attorney General, such review does not require a trial. This is illustrated by those cases where discretionary action was reviewed on motions for summary judgment [*Miyaki v. Robinson, supra; Alexiou v. Rogers, supra; Vichos v. Brownell, supra; Melachrinos v. Brownell, supra, Asikese v. Brownell, supra*].

Bowdidge v. Lehman, 252 F. 2d 366 (6th Cir. 1958), relied upon by appellant (Br. 8) is distinguishable from the case at bar. In that case Rule 16 was not involved,

as the court merely dismissed the Complaint without notice or hearing of any kind. Appellant, in contrast, was given ample opportunity to be heard at the pre-trial conference hearing, of which he had adequate notice.

In *Clay v. Callaway,* 177 F. 2d 741 (5th Cir. 1949), also relied upon by appellant (Br. 7), two judgments were involved, both rendered at pre-trial conferences. The Court of Appeals upheld the first judgment, stating (p. 743):

> "The first above stated judgment was correct, *no facts being involved.*" [Emphasis added.]

It was only with respect to the second judgment in the *Callaway* decision, where the District Court sought to resolve disputed issues of fact at the pre-trial conference that the Court of Appeals reversed. The *Callaway* case is thus in accord with the possition of appellee.

Moreover, appellant's action in the court below was one for a declaratory judgment, as appellant recognizes in his opening brief (Br. 8). Rule 57, Federal Rules of Civil Procedure, provides, *inter alia,* that the "court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar." In the light of this Rule, and in view of the authorities previously cited, the District Court did not violate the rules, as appellant contends (Br. 5-7), but rather acted in accordance with their liberal purpose to "secure the just, speedy, and inexpensive determination of every action" [Rule 1, Fed. Rules of Civ. Proc.].

II.

The Action of the District Court in Rendering a Final Decision at the Pre-Trial Conference Did Not Deprive Appellant of Procedural Due Process of Law in Violation of the Fifth Amendment.

Preliminarily, it should be noted that judicial review of deportation orders is not constitutionally required except by means of *habeas corpus;* and prior to the Immigration and Nationality Act of 1952, *habeas corpus* was the only mode of review available [*Shaughnessy v. Pedreiro,* 349 U. S. 48 (1955); *Heikkila v. Barber,* 345 U. S. 229 (1953). None of the decisions upon which appellant relies hold that review of deportation orders requires a regular trial. Indeed, both *Kwong Hai Chew v. Colding,* 344 U. S. 590, 597 (1953) and *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U. S. 86, 101 (1903) intimate that a hearing before an executive or administrative tribunal is constitutionally sufficient.[4] Other cases relied upon by appellant deal with the fairness of proceedings before immigration authorities, rather than with the nature of review by the courts [*Wong Yang Sung v. McGrath,* 339 U. S. 33 (1949); *Bridges v. Wixon,* 326 U. S. 120 (1945); *Bilokumsky v. Tod,* 263 U. S. 149 (1923)].

Therefore, assuming, *arguendo,* that the action of the court below was irregular, appellant's attempt to show a constitutional violation should fail. This is especially

---

[4]In *Kwong Hai Chew v. Colding, supra,* the Supreme Court declared (p. 597):

> ". . . Although it later may be established, as respondents contend, that petitioner can be expelled and deported, yet before his expulsion, he is entitled to notice of the nature of the charge and a hearing *at least before an executive or administrative tribunal.* [Emphasis added.]

true in view of the rule that the allowance of a petition for declaratory relief is discretionary with the trial court [*Garcia v. Brownell,* 236 F. 2d 356, 359 (9th Cir. 1956) and authorities cited therein; *Fletes-Mora v. Brownell,* 231 F. 2d 579 (9th Cir. 1955)].

However, as previously discussed (Part I of Argument, *supra*), the action of the District Court was not irregular, but was authorized by the Federal Rules of Civil Procedure. Appellant received due notice of the pre-trial conference, which implicitly informed him that the court might take any and all action authorized by Rule 16, Federal Rules of Civil Procedure. Appellant appeared at the hearing and agreed to submit the cause to the court for decision [R. 7]. A regular trial of the case would have been a futile gesture, since there were no issues of fact to be tried. Under these circumstances, it is submitted that appellant was not deprived of procedural due process of law in violation of the Fifth Amendment.

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

JAMES R. DOOLEY,
Assistant U. S. Attorney,

Attorneys for Appellee.